Supreme Court of the United States

OCTOBER TERM, 1942

No. 824

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., and LAWRENCE WARDS ISLAND REALTY COMPANY,

Petitioners,

vs.

THE CITY OF NEW YORK.

PETITION FOR REHEARING OF THE PETITION FOR CERTIORARI

ARCHIBALD N. JORDAN,
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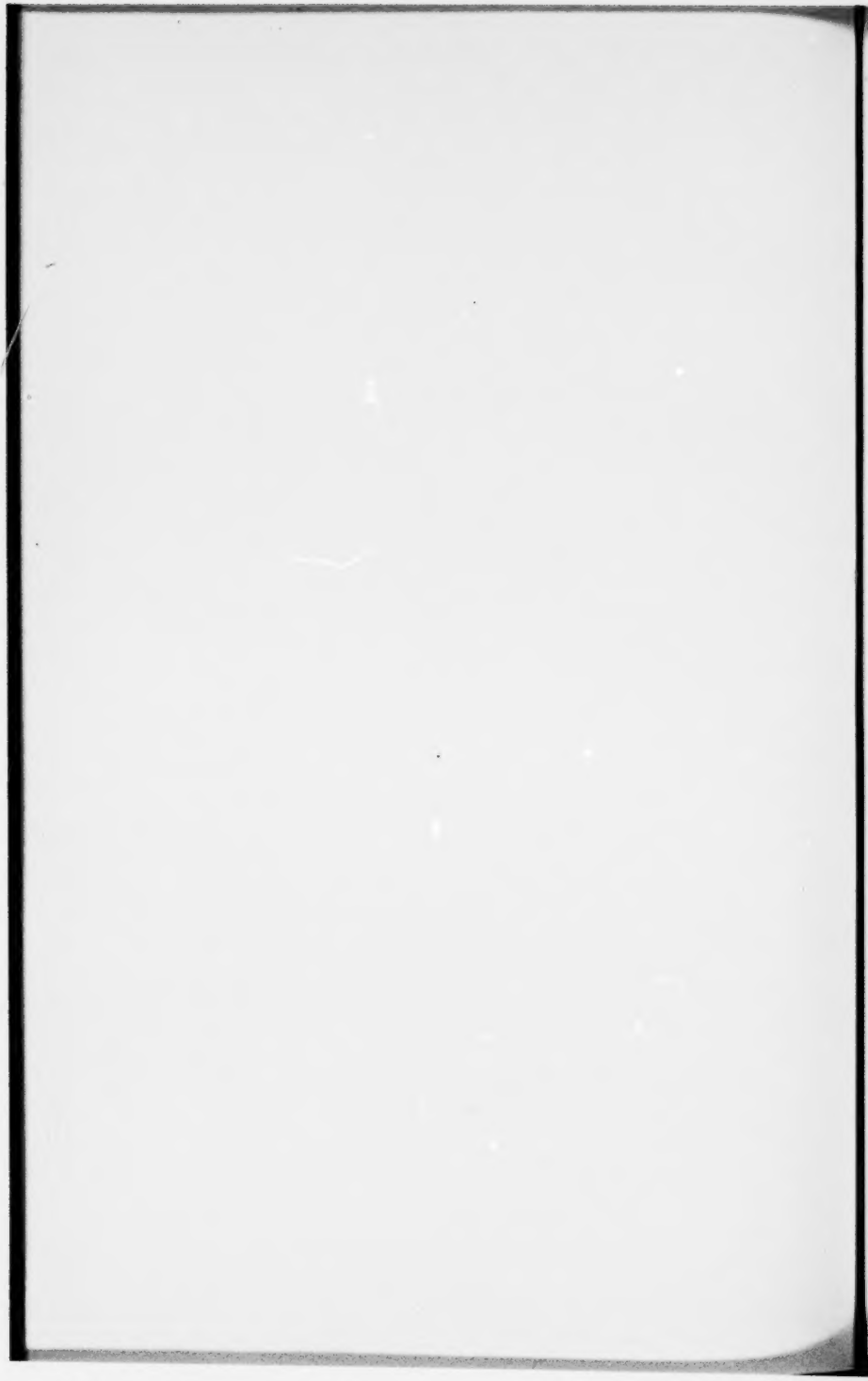
Of Counsel.

May 26, 1943.



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Now come the above named petitioners, Metropolitan-Columbia Stockholders, Inc., and Lawrence Wards Island Realty Company, petitioners, and present this their petition for a rehearing of the petition for certiorari in this case.

I.

Jurisdiction.

The petition for certiorari was filed March 13th, 1943, and was denied on May 3rd, 1943. This petition is filed within less than twenty-five days thereafter, under rule 33 (28 U. S. C. A. 354).

II.

Reasons for Petition for Rehearing.

On re-analysis, it is found that neither the petition for certiorari, nor the supporting briefs, specifically point out that the error of the Supreme Court, as affirmed by the Court of Appeals of the State of New York, upon the question of general law involved was the controlling factor in

the case. That error lay in interpreting Chapter 2, Laws of 1896, section 2 of which reads:

> "For the purposes of carrying out the proceeding section of this act, the Mayor, Aldermen and Commonalty of the City of New York are hereby authorized and directed to lease to the State of New York, at an annual rental of one dollar, the island known as Wards Island, now owned by the City of New York, together with all the buildings & improvements thereon and the equipment, fixtures and furniture of the asylums for the insane located on the said island."

and Chapter 139, Laws of 1908, amended Chapter 696, Laws of 1913, authorizing a new lease for fifty years of the island known as Wards Island "now owned by the City of New York", in a manner which impaired the obligations of the contract contained in Deed of Water Grant of 1811 to the Tideway and lands under water surrounding Wards Island, which grant conveyed the fee simple title to the predecessors in title of your petitioners for the beneficial use and enjoyment of said lands without any restrictions. Such interpretation by the judgment in the Supreme Court was in violation of Article I, Section 10 of the United States Constitution. It is by virtue of this legislation ordering and directing the lease that the City of New York claims title by adverse possession through its tenant the State of New York (R. 238, fols. 538-9).

A correct ruling, in accordance with this Court's decisions on that question of general law, must have resulted in a different disposition of the case.

In *Appleby* v. *The Mayor,* 271 U. S. 364, at 380, Chief Justice TAFT held this Court had jurisdiction, saying:

> "Ordinarily this Court must receive from the Court of last resort of a State its statement of state law as final and conclusive, but the ruling is different in a case like this. Jefferson Bank *v.* Skelley, 1 Black 436, 443; University *v.* People, 99 U. S. 309, 321; New Orleans Water Company *v.* Louisiana Sugar Company, 125 U. S. 18, 38; Huntington *v.* Attwill, 146 U. S. 657, 684; Mobile & Ohio Railroad *v.* Tennessee, 153 U. S. 486; Louisiana Railway & Navigation Company *v.* New

Orleans, 235 U. S. 164, 170, 171; Long Sault Co. *v.* Call; 242 U. S. 272, 277; Columbia Railway *v.* South Carolina, 261 U. S. 236, 243."

In *Illinois Central Railroad* v. *Illinois,* 146 U. S. at 446, this Court held a riparian right was property and could not be arbitrarily impaired.

The question of the impairment of contract of petitioners by the occupancy of the City through its tenant the State under the legislation authorizing the City's lease of Wards Island to the State was necessarily raised and presented to the Court at the trial in the hearing of objection of the Metropolitan-Columbia Stockholders, Inc., No. 21, R. 26, and objection of the Lawrence Wards Island Realty Company, No. 27, R. 38, to the tentative decree, in Point III of brief of petitioners in the Appellate Division, First Department, in petitioners' briefs in Court of Appeals, and by the introduction in evidence of the Lease itself, its preamble specifically setting up Chapter 139, Laws of 1908, amended Chapter 696, Laws of 1913, City's Exhibit 26, R. 134, and by Point II(2) Respondent's Appellate Division brief.

The affirmance by the Court of Appeals of the judgment of the Supreme Court necessarily raised the question of the impairment of the vested right of your petitioners under the Water Grant of 1811 in violation of Article I, Section 10, of the United States Constitution by legislation of State of New York enacted subsequent to the contract contained in said Grant.

This condemnation proceeding involves eleven different damage parcels, consisting of three different main classifications. These damage parcels are located in various and differing sections of Wards Island. Each classification raises different federal questions.

Your petitioners regret they did not present to this Honorable Court the points involved with sufficient clearness in their previous petition for writ of certiorari and supporting briefs. It is entirely their fault.

In order to present the points involved clearly to this Honorable Court we classify these parcels as follows:

Classification I.

Damage Parcels.	*Federal Question.*	*Classification.*
16 C 17	Impairment of Contract in violation of Section 10, Article I, U. S. Constitution, by Legislation subsequent to Water Grant of 1811 from State of New York granting a fee simple title to predecessors in title of petitioners with unrestricted beneficial rights in grantees. City Ex. 17, R. 331.	Lands under water. Title awarded to City o grounds of adverse possessio through occupancy by State a tenant of City under authori of Chapter 2, Laws of 189 State of New York, Chapte 139, Laws of 1908, amende Chapter 696, Laws of 191 authorizing and directing th execution of the lease by th City to the State of the islan known as Wards Island "no owned by the City of Ne York." City Ex. 26, R. 13 Acts of adverse possessio alleged by City: building se walls and filling in tidewa and lands under water and tak ing possession through its ten ant under lease authorized b Ch. 2, Laws 1896, Ch. 13 Laws 1908, amended Ch. 69 Laws 1913. Opinion Supreme Court, a affirmed by Court of Appeal R. 239, fol. 538. It is by this legislation th City claims ownership by ad verse possession through it tenant the State of New Yor

Classification II.

Damage Parcels.	*Federal Question.*	*Classification.*
5, 5A,	Title res judicata.	Lands under water filled i and lands under water.
9, 9A, 16, 16A.	Award of title to City is in violation of 14th Amendment of U. S. Constitution, under due process provisions. Deeds to Marsh were introduced in Beach case as Exhibits B and	Title awarded to City o grounds of execution of deed to Marsh made during pend ency of application for Wate Patent of 1811 by Barth olomew Ward, one of th signers of the application an

CLASSIFICATION II—(*continued*).

Damage Parcels.	*Federal Question.*	*Classification.*
	C. The title in that partition action was awarded to predecessors in title of petitioners after hearing on effect of Marsh deeds. See Notice of hearing, Copy Liber Equity Judgments, Vol. 202, p. 559. Claimant's Ex. U, R. 187.	alleged to have been delivered by him to Marsh before the issuance of the Patent by the State, to which application Marsh was not a signer.
	The City was a party to the partition suit and accepted its allotments of lands under that decision partitioning the tidelands and lands under water held in common.	

CLASSIFICATION III.

Damage Parcels.	*Federal Question.*	*Classification.*
16 D	Award of one dollar is not just compensation and is in violation of and repugnant to due process provisions of the 14th Amendment of U. S. Constitution.	Lands under water.
17 A		Title awarded to petitioners.
25 A		One dollar was awarded as just compensation on grounds that the cost of filling in lands under water would exceed their market value after the filling in. R. 239, fol. 538.
	The owner is entitled to the fair market value under the 14th Amendment to the U. S. Constitution. U. S. *v.* Tennessee Valley Authority *v.* Powelson, U. S. Supreme Court May 17, 1943. The award of one dollar to petitioners is in violation of the 14th Amendment. U. S. *v.* Miller, 317 U. S. 369, 374.	Depth under water of these lands is one foot.
	There was no evidence of the cost of filling in these damage parcels introduced anywhere in the record. Therefore the finding by the court that these lands under water must be filled in in order to have substantial value is not supported by any evidence in the record, and is in violation of due process provisions of the 14th Amendment.	

CLASSIFICATION III—*(continued)*.

Damage Parcels.

Federal Question. *Classification.*

The holding that lands under water have no substantial value unless filled in is contrary to the practice of the State of New York in selling its lands under water for ¼th of the value of the adjoining upland lots, a practice that has been followed by the State for many years and through which the State has received millions of dollars. The receipts for these lands is devoted under the law exclusively to park purposes by the State.

The holding is contrary to the recent judgment of the Court of Claims of the State of New York awarding $50,000. for two small parcels of lands under water in the Harlem River, near Spuyten Duyvil, in the case of Johnson Iron Works in 1936.

The holding of nominal value for lands under water unless filled in is contrary to the practice of the City of New York in leasing its unfilled in lands under water at substantial annual rentals, and to its policy of claiming high values for its lands under water condemned by the United States Government now pending in the U. S. District Court for the Southern District of New York (Pier 88; "U. S. S. Lafayette" salvage case) and in U. S. District Court of the Eastern District of New York, Wallabout Basin condemnation for extension of U. S. Brooklyn Navy Yard, where the City is claiming millions of dollars for its lands under water.

The City pays the State of New York one dollar for its

CLASSIFICATION III—*(continued)*.

Damage Parcels.

Federal Question. *Classification.*

lands under water, and in Wards Island when condemning these lands claims they are worth only one dollar, but seeks millions when claiming an award for the condemnation of them by the United States, or for any reason it must assess the cost of these lands acquired for city parks to a larger upland area. Such inconsistency should shock the conscience of a court of equity.

The holding of nominal value for lands under water unless filled in is contrary to the rule of property long established by the highest court in this state and confirmed by the Appleby case, 271 U. S. 364, which was sustained by the Appellate Division of the First Department of this State in North River Water Front case, 219 A. D. 27, at 34, and which Mr. Justice McLaughlin on July 1, 1941 in Re Waterfront and Harbor case, 30 N. Y. Sup. (2nd) 187, (the judge in this instant case), stated that "the Appleby decision is the final and controlling authority is made clear by the Appellate Division, First Department, in the matter of the City of New York North River Waterfront, 219 A. D. 27." This last case awarded for two parcels of underwater lands under water where the depth was forty feet, and area 60,000 square feet, the sum of $825,958. It is in the Hudson River at the foot of 44th to 47th Streets, New York City. This is one-half the area of Damage Parcels 16-D and 17-A in the instant case, taken together, and which are only one foot under water.

CLASSIFICATION III—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	The rule of substantial value for lands under water was followed in Matter of City Island (Main St.) 216 N. Y. 67, 68; and in Inwood Park in the Borough of Manhattan, 219 A. D. 478, where $252,000 was awarded for lands under water in the Hudson River where the depth was 40 feet under water, and area about 500,000 square feet, subject to riparian rights of upland owners, about four times larger than Damage Parcels 16-D and 17-A together in the instant case; and also in the award of $210,000 for lands under water in the Fort Washington Park case where the depth was 40 feet, and area twice the size of the instant Damage Parcels 16-D and 17-A.	
	The previous Wards Island condemnation case, 158 Mis. 684, R. 238, where the same judge as in the instant case awarded one dollar for a damage parcel of lands under water taken by the City concerns a parcel of land that has no comparable value to the damage parcels in the instant case. It was Water Lot 18, located at the foot of Negro *Bluff* on the East River, and immediately adjoined a hill 40 feet in height adjacent to the waterfront, which rendered the underwater plot unfit for building wharves or docks as inland transportation to such docks or wharves would be too costly and difficult for the grade up hill from the docks or wharves is 50%, and impossible for heavy loads to be carried by trucks from the docks or wharves. A dock is a slip; and a wharf is a pier at which to unload vessels.	

CLASSIFICATION III—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	All the damage parcels in the instant condemnation proceeding on the contrary are favorably located for the building of docks or wharves as they are adjacent to large areas of flat inland upland plots with plenty of room for movement and turning of trucks carrying goods to and from docks or wharves on the waterfront, and are therefore of substantial value for dockage and wharfage operations.	

CLASSIFICATION IV—MISCELLANEOUS.

Damage Parcels.	*Federal Question.*	*Classification.*
Westerly half	No title to uplands adjoining in Marsh in evidence.	Portions of Damage Parcels. Lands under water and lands under water filled in.
9	His grantor had no title to the uplands.	Title awarded to City on grounds of Marsh deeds.
9 A	The award of title to the City is a violation of the due process clause of the 14th Amendment of U. S. Constitution.	
The portion of Damage Parcel 17 in front of Upland lots, Nos. 46, 47, and 48 Bridges Map of 1807.	There is no evidence in the record of the building of the sea walls and filling in by the City. They were decided in the Beach case not to be an improvement of the tideway in such a manner as tidelands are usually filled in in the Harbor of New York. See testimony of Rudolph Rosa, Civil Engineer, Copy Liber 202 Equity Judgments, page 373, Claimant's Exhibit U. R. 187, (Record in Beach case), wherein Engineer Rosa testified: Q. "In your judgment as a practical engineer (referring to sea	Lands under water filled in. Title awarded to City by adverse possession because of building of sea walls and filling in by City. These sea walls were built and filling in done in 1870 or prior; a period 23 years before the City took title to the uplands adjacent to these parcels. The decision by the Supreme Court, as affirmed by the Court of Appeals, that the City filled in, bulkheaded and built on the tideway lands is not sup-

CLASSIFICATION IV—MISCELLANEOUS—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	walls and testimony of John C. Hearne, superintendent of construction of sea walls in 1870 erected by Commissioners of Emigration then owners of the uplands adjoining tideway in front of damage parcels 16, 16-A, 16-C and 16-D, and 17 and 17-A (and heard by Rosa); do they at all improve the lands of the Water Right for purposes of wharfage or dockage." A. "No, sir." At page 374 (*ibid*): Q. "In their present location are those walls of any improvement or benefit to the lands under water for such purposes as such lands are usually used in and about the harbor of New York." A. "No, sir." The award is violative of the due process clause of the 14th Amendment of the U. S. Constitution. The upland owners completely destroyed the foreshore by building the sea walls. The tideland owners thereafter could no longer use the power of the tide to raise boats at high tide, and repair the boats when the tide was low, and refloat the boats off again at the return of high tide. The subservient tenement was completely destroyed by the upland owner who had the right of easement of passage over the subservient tidelands, and by his wrongful act thus lost his easement of access in destroying the subject of his easement.	ported by the evidence in the record. A seawall is not a bulkhead where vessels may load and unload cargoes. See East River Drive case, 289 N. Y. Sup. 433 at 448. A seawall is built to prevent the upland from being washed away by the river current, and is not constructed in the aid of commerce or navigation as an improvement of the tidelands. It will not support a claim for adverse possession under Section 40, Civil Practice Act of the State of New York.

CLASSIFICATION IV—MISCELLANEOUS—*(continued)*.

Damage Parcels.	*Federal Question.*	*Classification.*
	The beach or tideway could no longer be rented for use for storing boats or repairing them. The beach was gone.	
U. S. Lighthouse deed portion Damage Parcels 5 and 5 A.	The judgment of Supreme Court on U. S. Deed executed under authority Chapter 386 Laws, 1902, New York, amended, Chapter 639 Laws 1903, amended, Chapter 619 Laws 1904, by City to U. S. Government, is, as affirmed, related back to effect the taking of property by United States from petitioners in violation of 5th Amendment to U. S. Constitution and is a taking of private property without just compensation by action of the United States in taking possession of lighthouse plot portion of damage parcels 5 and 5 A. (U. S. *v.* Tennessee Valley Authority *v.* Powelson, supra.)	

The lands under water belonging to the City of New York are carried at high assessment values on the City's tax books, but they are are exempt from taxes, but by adding to the City's taxable values of lands, they enable the City to claim a large share of the funds collected by the State and distributed to the cities. The lands under water on Wards Island were taxed to petitioners at high value, and petitioners have paid over $40,000 taxes since the land was partitioned and titles awarded to them or their predecessors in title in 1870. The City assesses its waterfront lands at $1,000 a front foot on the west side of the Harlem River opposite Wards Island, and obtained high rentals for them. They assess lands under water on the Hudson River at high values, but all exempt from taxes. This does not prove value, but it shows the inconsistency as the City pays the State only one dollar for lands under water when

it obtains them from the State, yet carries them at high values on its tax books to obtain a larger share of the State's moneys. This is a pernicious system, but an explanation for the reason of these high values and then low values claimed by the City may aid the Court in understanding the inconsistency.

The City's share of the State-collected taxes is estimated by State Comptroller Moore during the present fiscal year to be $40,332,260. (See The New York Times, Late Edition, page 25, Column 1, May 18th, 1943.)

High tax assessments by New York City has caused a bear market in real estate since November 16th, 1937, when the petitioners' property was condemned, and six months after Wards Island was connected by vehicular access over the bridge to Manhattan. The financial weakness of New York City was chiefly caused by the City's paying twice the normal rate of interest that 20-year prime securities carry. Prime bonds receive 2%, and the City pays 3½, 4 and 4½ per cent interest on its 20-year and over bonds. This causes a high tax rate, and forces a low real estate market as the City taxes must be raised to meet the loss. The City overlooks the saving of over $250,000,000 to be had by reorganizing its bond issues, but states it is necessary to raise taxes.

This has a strong bearing on condemnation awards as the fair value theory is used in appraising real property in making awards in condemnation for just compensation. The fair value is based upon the price a willing buyer will pay a willing seller in a normal free market. Money market conditions are at least half the cause of why there is or is not a normal free market with investors and operators free to move in or out of the market in response to the conditions of supply and demand. (See The New York Times, Late Edition, page 25, Column 3, May 18th, 1943.)

U. S. v. *Miller, supra,* 374.

Boom v. *Patterson,* 98 U. S. 403.

McCandless v. *U. S.,* 298 U. S. 342.

U. S. v. *Tennessee Valley Authority* v. *Powelson,* U. S. Supreme Court, May 17, 1943.

The controlling questions therefore are:

Did the judgment of the Supreme Court as affirmed by the Court of Appeals impair the obligation of a contract contrary to Article 1, Section 10 of the United States Constitution?

Was the decision of the Supreme Court as affirmed by the Court of Appeals in violation of the due process provisions of the Fourteenth Amendment of the United States Constitution?

Was the judgment of the Supreme Court as affirmed by the Court of Appeals in violation of the 5th Amendment of the U. S. Constitution prohibiting the taking of private property without just compensation by the United States, and of the 14th Amendment without due process?

On those questions, the judgment of the Supreme Court as affirmed by the Court of Appeals of the State of New York is in direct conflict with the applicable decisions of this Court, to wit, on impairment of a contract, *res judicata*, no evidence to support findings as contrary to law, and on taking of private property without just compensation.

Public Importance

The decision of the court below as affirmed is likely to cause future uncertainty of titles and encourage litigation by the re-opening of questions concerning them that have previously been settled by the courts. The failure to sustain the rule that *res judicata* completely settles the controversy between parties to the suit not only disturbs titles in the State of New York, but throughout the nation.

The decision overturns important practices of the departments of nearly three-fourths of our States in their present practice of selling lands under water belonging to the States at substantial values, and will seriously affect the finances of those states, many of which devote the proceeds of sales of their tidewater lands and lands under water

exclusively to school purposes by special laws enacted to support public education; such as New Jersey.

The finances of the United States, municipalities, and individuals owning waterfront property will be seriously affected if this decision as to nominal value for lands under water unless filled in is sustained by this Court, and will involve millions of dollars of loss in federal, state and municipal revenues throughout the nation. New York City is specifically exempted by special law which forbids it to sell its waterfront property and may therefore afford to seek this decision.

For the foregoing reasons, Metropolitan-Columbia Stockholders, Inc., and Lawrence Wards Island Realty Company, petitioners, respectfully urge that a rehearing be granted, that upon further consideration the order denying the petition for certiorari be revoked, and that the writ of certiorari issue.

ARCHIBALD N. JORDAN,
Counsel for Petitioners.

I, Archibald N. Jordan, counsel for the above named petitioners, Metropolitan-Columbia Stockholders, Inc., and Lawrence Wards Island Realty Company, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

ARCHIBALD N. JORDAN.

GLENN N. W. MCNAUGHTON,
Of Counsel.